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NTSB Order No. EA-4099

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. DANIEL J. DILL, THOMAS DAVID PRATER, and TROND EIDE, Respondents.	Docket Nos. SE-11524 SE-11522 SE-11523

OPINION AND ORDER

The Administrator has appealed an order of Administrative Law Judge Jerrell R. Davis issued on December 17, 1991, in which the law judge granted respondents' motions to dismiss stale complaints, motions to suppress evidence, motions to disqualify agency counsel, and in which he then terminated the proceedings. Respondents have filed a brief in reply, urging the Board to

affirm the law judge's order.[1]

Respondents are alleged to have served as pilots on flights for compensation or hire, without holding an operating certificate issued under Part 135 of the Federal Aviation Regulations (FAR), and without having undergone the training and/or testing required of pilots of Part 135 operations.[2] All

[1]A copy of the law judge's order is attached to the decision.

[2]The Administrator alleged violations of 14 C.F.R. §§ 135.5, 135.293 (a) and (b), and 135.343 as to all three respondents, and § 135.299 as to respondents Dill and Eide. These regulations provide in pertinent part as follows:

§ 135.5 Certificate and operations specifications required.

> No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part....

§ 135.293 Initial and recurrent pilot testing requirements.

> (a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot....
> (b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft....

§ 135.343 Crewmember initial and recurrent training requirements.

> No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service....

of the flights were allegedly arranged by or through Mr. Clarence Patterson. Respondent Dill is alleged to have served as pilot-in-command on flights from May 1987, to May 1989.[3] Respondent Prater was alleged to have served as a pilot on flights occurring from December 1987, to January 1989. Respondent Eide was alleged to have served as a pilot on flights occurring from April 1988, to January 1989. All three respondents received Notices of Proposed Certificate Action in November 1989. Respondent Dill was issued an order of revocation, and respondents Eide and Prater were issued suspension orders for 150 days and 120 days, respectively. The law judge initially ruled against respondents but reconsidered their positions on remand[4] and granted their motions.

The Administrator asserts on appeal that the law judge erred with regard to his rulings on all three motions. Because we find, as explained below, that the law judge correctly dismissed all of the complaints as stale under Rule 33 of the Board's Rules of Practice and Procedure, 49 C.F.R section 821.33,[5] we need not

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§ 135.299 Pilot in command: Line checks: Routes and airports.

> (a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly....

[3]Appendix 7 of the Appeal Brief indicates these flights actually occurred from October 8, 1987 to May 18, 1989.

[4]Following the Board's denial of interlocutory appeal, NTSB Order No. EA-3390 (1991).

[5]49 C.F.R. § 821.33 provides as follows:

address the remaining issues raised in this appeal. For the reasons that follow, we deny the appeal.

In November 1986, Jerald Ritchey, an inspector with the Federal Aviation Administration (FAA) assigned to the Tennessee Flight Standards District Office (FSDO) in Nashville, Tennessee,

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§ 821.33 Motion to dismiss stale complaint.

> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:
> (a) In those cases where a complaint does not allege lack of qualification of the certificate holder:
> (1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.
> (2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.
> (3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect to the Administrator's good cause issue allegations.
> (b) In those cases where the complaint alleges lack of qualification of the certificate holder:
> (1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.
> (2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

became the principal operations inspector for Clarence Patterson, the holder of a Part 135 air taxi certificate. In the course of reviewing Patterson's records, Inspector Ritchey suspected that Patterson might be operating flights for compensation or hire utilizing aircraft which were not listed on his operations specifications. Inspector Ritchey also describes an incident, in a statement he prepared on August 28, 1989, concerning a visit he made in August of 1987 to the Brock Candy Company ("Brock"), which added to his suspicions. According to the statement, Inspector Ritchey was told by the comptroller of the company that Brock rented its Cessna Conquest aircraft to Mr. Patterson, and that Mr. Patterson then arranged for the pilots that were going to fly Brock's Cessna Conquest, prior to the aircraft being rented by anyone. According to Inspector Ritchey, "[t]his began my investigation of alleged illegal air taxi operations of Mr. Patterson."

On August 20, 1987, an attorney representing Brock wrote to Inspector Ritchey and stated that "[a]fter thoroughly discussing this matter with Brock's pilot [respondent Dill, whose name was included in the letter] and other personnel at Brock" familiar with the operation of the Cessna Conquest, and, after discussing Brock's use of the aircraft with FAA counsel in Atlanta, he had advised Brock that its "time-sharing" arrangement was not in violation of the FAR.[6] The letter invited Inspector Ritchey to

[6]According to a memorandum dated August 17, 1987, Brock's attorney had discussed with an FAA attorney the propriety of a time-sharing arrangement of a Cessna Conquest leased by his

contact Brock's attorney if Ritchey wished to discuss the matter further. No subsequent contact occurred between the two. In December of 1987 or January of 1988, Inspector Ritchey stopped his investigation, at the direction of his superior.

One year later, in January 1989, FAA Inspector Lawrence Williams, also assigned to the Nashville FSDO, again began to investigate the allegedly illegal air taxi activities conducted by Mr. Patterson.[7] According to his affidavit, he obtained the names of corporations involved with Patterson, and began to contact them for information. This is said to have led to the identification of the respondents as full-time Brock employees and as pilots who were potentially involved with Patterson's operations. Inspector Williams sent letters of investigation to the respondents on July 17, 1989. But Notices of Proposed Certificate Action were not issued for an additional four months, sometime in November 1989.

Respondents argued before the law judge that the delay which occurred between the fall of 1987, when they claim the FAA knew or should have known of the alleged violations, and the issuance of the November 1989 notices warranted dismissal of the complaints under Rule 33. Respondents stress that counsel for

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client on a long-term basis from Cessna, and she advised him that it may be appropriate to sublease the aircraft, without a crew. FAA counsel suggested that the attorney draft a time-sharing lease agreement.

[7]In Administrator v. Patterson, NTSB Order No. EA-3762 (1993), we affirmed a dismissal of the Administrator's revocation order against Patterson for insufficient evidence.

Brock discussed the requirements of aircraft leasing with FAA counsel and subsequently informed Inspector Ritchey of the company's belief in the legitimacy of its "time-share" arrangements in August of 1987, with a request for further discussions if necessary. (It is significant in this regard that all of the flights which are the subject of the complaints took place after this correspondence.) Respondents also claim that the one-year lapse between the end of the investigation of this matter by Inspector Ritchey and the resumption by Inspector Williams is inexplicable, akin to entrapment, and should stop FAA's prosecution.

The law judge ruled, for purposes of determining whether the complaints were stale, that the FAA investigation which ultimately identified respondents began on August 13, 1987. (Order at page 3). He further determined that the initial inspector [Ritchey],

> cannot excuse his lack of diligence by asserting that the respondents' names did not surface during his investigation because a simple telephone call (a) would have informed him with respect to the method and manner whereby the involved aircraft was being time-shared [and], (b) would have apprised him with respect to respondents' identities, if not already known to the inspector....the inspector's awareness that the aircraft was being time-shared preceded the Notices by 2 years and 3 months. The record appears to reflect a total lack of diligence on the part of the FAA based upon the 1-year hiatus in the investigation from the time the first inspector was relieved until the time that the second inspector took over. Moreover, the second inspector waited more than 6 months to initiate the subpoena process. (Order at 4).

The Administrator argues in this appeal that the law judge's analysis is flawed by his determination that the Administrator

should have known of the respondents' possible violations as a result of the information he received on August 13, 1987. He claims that since Inspector Ritchey's investigation was aimed at Patterson and not the respondents, it was not reasonable to have expected him to determine the identity of the pilots who were flying for Patterson. Essential to the Administrator's view are the suppositions that (1) the investigations of Inspectors Ritchey and Williams cannot be faulted by any action or inaction of Inspector Ritchey, and (2) these investigations were primarily aimed at the use of unauthorized aircraft, and therefore the discovery of allegedly unauthorized crewmembers actually occurred within six months of the Notices to respondents.

We agree with the administrative law judge. We are unpersuaded by the Administrator's argument that this matter should be viewed as two distinct investigations, focusing on a third party, and that identity of respondents was discovered incidentally and late in the process. The FAA's own inspector stated that the investigation was commenced only after an interview with respondents' employer, and that use of the Brock aircraft was the issue. Indeed, this interview appears to have led to correspondence and an invitation for further discussions with respondents' employer, an invitation which the FAA inexplicably did not pursue.

Perhaps the delay here is understandable. The allegations involve a complex area of regulation governing the sharing of aircraft and the availability of qualified pilots, with the

general proposition that regulatory oversight will increase as arrangements proceed from the cooperative to the commercial. Corporate aircraft may be flown under the requirements of Part 91, and this may be so even where the aircraft are shared between two or more parties, and where the aircraft are managed by third parties. But there are also circumstances, some having to do with the provision of pilots, where the more stringent regulations of Part 135 will apply. The distinction between these two sets of regulations are purposeful and understandable, but we would ignore history to assume that there is no confusion over the matter. Indeed the record here demonstrates that FAA itself proceeds with far less than a certain hand.[8] But if the delay is understandable, it is not necessarily excusable.

The Board's stale complaint rule is meant to assure that the Administrator's investigation and prosecution of regulatory violations are pursued with reasonable diligence. Among the many reasons oft cited for the rule are the prevention of prolonged jeopardy and the necessities of the preservation and assemblage of evidence.[9] These are good and sufficient reasons, as the

[8]See Appendix 3 to Respondents' Brief, statement of FAA Investigator Ritchey to the effect that he thought the arrangement between Brock and Patterson might be illegal but that the matter would be decided later by someone other than him; see also, Administrator v. Bowen, NTSB Order No. EA-3351 (1991) (Administrator's interpretation of FAR § 91.501 exceptions to requirements for a Part 135 certificate rejected by Board as inconsistent with preamble to regulation).

[9]The rule does not impose on a respondent the burden of demonstrating that a specific delay has in fact prejudiced his defense. Instead, a respondent is presumed to have been prejudiced in his ability to defend against the charges because

protection of the rights of individuals is not inconsequential. But the rule also serves to underscore the fact that unsafe conditions require speedy remedy. That is, there is a public, safety-related reason for the rule as well. That the rule is meant to advance, not retard, safety enforcement is the reason why, even in the face of lengthy delay, the Administrator will be permitted to proceed with cases that involve lack of qualification or where the public interest requires the imposition of sanction. But the rule will ordinarily bar untimely prosecution, and thereby act as a stimulus to diligent safety enforcement.[10] The need for diligence is evident in the facts of this case. Where there is a question of a violation, not simply in the minds of potential respondents, but in the FAA as well, the FAA should proceed with some dispatch to resolve the matter rather than let it drag on, with the accumulation of potential violations.

An additional facet of the Board's application of its rule is important to this case. The rule does not bar prosecution of undiscovered violations, however old. Board precedent requires

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of a delay exceeding six months. It is then incumbent on the Administrator to overcome that presumption of prejudice by affirmatively establishing that good cause exists which excuses the delay. Administrator v. Zanlunghi, 3 NTSB 3696, 3697 (1981).

[10]To put the present case into this context, we would underscore that leasing/chartering activities thought to be unlawful by FAA are not, by the dismissal of this complaint, made prospectively lawful. We do not pass on these issues at all, and would note only that we owe deference to the Administrator's interpretation of FAA rules and that respondents or others engaged in activities alleged on this record do so at risk of new citations.

only that, where the Administrator does not become aware of the alleged violations until after they have occurred, the FAA should process the facially stale charges "with greater dispatch than they would have received had they been discovered more or less contemporaneously," in order to avoid dismissal. Administrator v. Carter, NTSB Order No. EA-3730 at 5 (1992). If the Administrator fails to meet that burden, by showing that he exercised reasonable prosecutorial diligence after his receipt of the information concerning the possible violations, the Board has not hesitated in finding that the FAA has failed to overcome the presumption that a respondent has been prejudiced in his ability to defend against the charges. The administrative law judge concluded that "greater dispatch" had not been accomplished here and we cannot disagree with this appraisal.

Our understanding of the facts of this case requires the conclusion that the FAA began an inquiry into the operations of Patterson from early 1987, and that this inquiry led to discussions about Brock's aircraft, and the provision of pilots for that aircraft, almost at outset. Reasonable diligence in this investigation would have short-circuited most of the flights and much of the controversy here. However, even if the Administrator's investigation is viewed as having commenced in January 1989, it was still necessary for the FAA to show that it expedited the processing of the cases in light of the staleness of the charges, in order to overcome the presumption of prejudice. See Administrator v. Brea, NTSB Order No. EA-3657

(1992); and Administrator v. Holland, NTSB Order No. EA-3987 (1993). Rather than establishing that he took steps to actually expedite these cases, Administrator v. Carter, NTSB Order No. EA-3730 (1992) at p. 5, the Administrator states that the delay was a result of the "complexity" of the cases, noting that there were volumes of paperwork and many pilots involved in Patterson's operations. We think this insufficient. Once the Administrator identified the respondents as involved in potential and ongoing violations dating back almost two years, he was required to treat these stale charges as non-routine, priority matters, Administrator v. Carter, supra at 6, and minimize any further delay. Administrator v. Brea, supra at 5. We think this is particularly so where the FAA had been in contact with respondents' employer from the outset, and when there had been an outstanding invitation from this employer to discuss the time-share arrangement if the FAA questioned its legal status.

We recognize that, as to respondent Dill, an allegation of a lack of qualification has been made by the Administrator, and that, accepting this allegation, the complaint will be heard irrespective of its staleness. However, the law judge found that the complaint against respondent Dill did not legitimately allege a lack of qualification, stressing Dill's technical skills as a pilot. While we agree with the Administrator that Dill's piloting skills were irrelevant to this determination, we reach the same conclusion as the law judge, on other grounds. The Administrator, citing Administrator v. Sexauer, 5 NTSB 2456

(1987), argues that since there is Board precedent upholding revocation of a pilot certificate where the pilot-in-command served on only nine flights without a Part 135 certificate, then a fortiori, the allegation in this complaint presents an issue of lack of qualification. Our review of Board precedent, however, convinces us that revocation has typically been sought by the Administrator only in situations where the pilot-in-command is more culpable in the conduct of the unlawful operation, for example, where the pilot is also the operator of the flights. Compare Administrator v. Brown, NTSB Order No. EA-3698 (1992)(pilot-in-command who is not the operator receives 120-day suspension for 22 flights); Administrator v. Mardirosian, NTSB Order No. EA-3216 (1990)(pilot-in-command who is not the operator receives 15-day suspension for one flight), with Administrator v. Woolsey, NTSB Order No. EA-3391 (1991), aff'd sub nom. Woolsey v. NTSB, 993 F.2d 516 (5th Cir. 1993)(pilot-in-command revoked where he is sole operator of flights). In the instant case, there is no evidence that respondent Dill was more actively involved in the conduct of Patterson's operations than respondents Eide and Prater, nor does the Administrator argue that such evidence is available. The Administrator's only argument is that respondent Dill's conduct is more egregious because he served on twice as many flights as the other respondents. While this is true, and not necessarily immaterial, it remains that the number of flights by respondent Dill cannot be divorced from the FAA's own involvement in the confused status of Brock's time-share

arrangement. We think it is too strong to suggest, as does respondents' brief, that Dill was entrapped by the FAA's actions and inactions subsequent to the August 1987 letter from Dill's employer. But we do think that the number of flights charged against Dill reflect more the passage of time than the quality of Dill's regard for regulatory requirements, and we are not able to conclude that a lack of qualification has been reasonably pled. We conclude that, under the circumstances here, an issue of lack of qualification is not presented by the allegations against respondent Dill, and all of the complaints were properly dismissed by the law judge under Rule 33.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The law judge's order granting the motion to dismiss stale complaints is affirmed and the proceedings are terminated.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.